Supreme Court, U.S.
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88- 1828

No. -

In the Supreme Court of the United States

OCTOBER TERM, 1988

BERKLEE COLLEGE OF MUSIC,
PETITIONER,

v.

BERKLEE CHAPTER OF THE
MASSACHUSETTS FEDERATION OF TEACHERS,
LOCAL 4412, AFT, AFL-CIO,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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I

QUESTION PRESENTED

Whether a federal court reviewing an arbitrator's decision under 29 U.S.C. §185 is compelled to uphold the decision if it can itself devise an argument which it can "imagine" could be accepted by "some judges or arbitrators," even if the argument was not relied on by the arbitrator and even if the arbitrator's decision exceeds the arbitrator's authority and is contrary to the plain language of the underlying collective bargaining agreement.

List of Parties
And Rule 28.1 Statement

The parties to the proceedings below were the petitioner, Berklee College of Music, and the respondent, Berklee Chapter of the Massachusetts Federation of Teachers, Local 4412, American Federation of Teachers, AFL-CIO.

Petitioner Berklee College of Music is a non-profit corporation which has no parent company, subsidiaries, or affiliates.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner Berklee College of Music respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit, entered in the above proceeding on September 27, 1988. A timely petition for rehearing was denied on February 9, 1989.

Opinions Below

The opinion of the Court of Appeals for the First Circuit, reversing the decision of the district court by a 2-1 vote, is reported at 858 F.2d 31, and is reprinted in the appendix hereto, p. A-1, *infra*.

The memorandum decision of the United States District Court for the District of Massachusetts, vacating the decision of the arbitrator, has not been reported. It is reprinted in the appendix hereto, p. A-20, *infra*.

The opinion and award of Arbitrator Mark L. Irvings has not been reported. It is reprinted in the appendix hereto, p. A-23, *infra*.

Jurisdiction

Petitioner brought this suit in the United States District Court for the District of Massachusetts pursuant to §301 of the Labor Management Relations Act, 29 U.S.C. §185, seeking an order vacating an award issued by Arbitrator Mark L. Irvings on May 11, 1987. See p. A-23, *infra*.

On November 19, 1987, the district court issued a judgment and memorandum of decision vacating the arbitrator's award. See p. A-20, *infra*.

On respondent's appeal, the Court of Appeals for the First Circuit on September 27, 1988, entered a judgment and opinion reversing, in a 2-1 decision, the district court's judgment. See pp. A-1, A-34, *infra*.

Petitioner, within the time allowed under Federal Rule of Appellate Procedure 40, filed a petition for rehearing en banc, which under the procedures of the First Circuit was treated as a petition for rehearing as well as a suggestion for rehearing en banc. The petition for rehearing and the suggestion for rehearing en banc were denied on February 9, 1989. See pp. A-35, A-36, *infra*.

The jurisdiction of this Court to review the judgment of the Court of Appeals for the First Circuit is invoked under 28 U.S.C. §1254(1).

Statute Involved

Jurisdiction to review the arbitrator's award was invoked under 28 U.S.C. §§1331 and 1337 and under Section 301 of the Labor Management Relations Act, 29 U.S.C. §185:

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

* * *

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

Statement of the Case

Petitioner, a non-profit educational institution, and respondent, a union representing certain of petitioner's employees, were parties to a collective bargaining agreement which contained a detailed grievance and arbitration procedure for the resolution of contract disputes. In this case, when petitioner refused to hire a part-time teacher on a full-time basis, the respondent sought to file a grievance on the teacher's behalf.

The collective bargaining agreement between petitioner and respondent provided that grievances of the type involved in this case "must be presented in writing to the Dean of Faculty within ten (10) calendar days after the action to be grieved occurred." Pp. A-37, A-2, A-7, A-26, *infra*. The agreement futher provided: "Time limits designated in this Article for processing grievances and for bringing a matter to arbitration may only be extended by mutual written consent." Pp. A-37, A-7, A-19, A-26, *infra*.

The agreement also defined the authority of the arbitrator, providing that the "arbitrator may decide only whether the Employer violated this Agreement as alleged in the grievance and the appropriate remedy under this Agreement, if any." Pp. A-37, A-7, A-15, *infra*. The agreement stated explicitly that the arbitrator had no "authority to alter this Agreement in whole or in part or to add to or delete any of its provisions or to render any award in conflict with its provisions." Pp. A-37, A-21, *infra*.

When it received the grievance, petitioner stated that the grievance had not been filed in a timely fashion in accordance with the terms of the agreement and denied it. Respondent sought arbitration.

At the arbitration, the parties agreed to a bifurcated proceeding, with the issue of timeliness to be decided first. The arbitrator found that "clearly" the "grievance missed the deadline by a few days" and "was not filed timely in accordance with the collective bargaining agreement." Pp. A-31, A-33, *infra*. Rather than stop there, he continued on to state that "[b]ecause no harm flowed from the . . .[late filing], the breach of the contractual [timeliness] requirement must be termed *de minimis*" and thus "the basic grievance may proceed to arbitration without limitation." P. A-32, *infra*. The arbitrator reasoned that he was allowed to "fashion a remedy" for the late filing because "the consequences of a missed deadline have not been specified." P. A-31, *infra*.

Petitioner had not agreed to give the arbitrator authority to "fashion a remedy" for late filing of the grievance. The agreed-upon submission to the arbitrator was limited to the question of whether the matter was timely filed, and the petitioner refused to agree to a submission which would have authorized the arbitrator to allow an untimely grievance to be heard.[1]

[1] The parties agreed to the following issue:

> Was the grievance filed in this matter timely in accordance with the collective bargaining agreement?

The respondent suggested an additional question:

> In the event the grievance was not filed timely, were there extenuating

Moreover, the agreement gave the arbitrator the authority to decide remedies for contractual violations by petitioner, the employer, but not "remedies" when grievances were filed in an untimely fashion. See p. 4, *supra*; pp. A-37, A-15, *infra*.

Petitioner, invoking 29 U.S.C. §185 and 28 U.S.C. §§1331 and 1337, filed suit in the district court to set aside the award, and the parties filed cross-motions for summary judgment. The district court allowed petitioner's motion, vacating the arbitrator's award. In conformity with this Court's decisions, the district court recognized that its power was "narrow" and reasoned that it could vacate the arbitrator's award "only where the latter does not 'draw its essence from the bargaining agreement.'" Pp. A-20 to A-21, *infra*. Focusing on the language of the agreement, the court noted that the agreement prescribed time limits for filing of a grievance, provided that the "only" method for extending those limits was "mutual written consent," and expressly stripped the arbitrator of authority to render any award in conflict with the agreement. P. A-21, *infra*. The district court therefore concluded that the arbitrator had no authority to "fashion a remedy":

> The [arbitrator's] award unquestionably modifies the express and precise language of Article XI, the grievance procedure. While the Agreement does not explicitly spell out that failure to file on time is deemed to be a waiver of the grievance, that is, at least, implicit in the requirement of written mutually-agreed extensions. Having determined that the union had failed to adhere to the filing deadlines of the Agreement, the arbitrator was not then free to "interpret" unambiguous language to fashion a remedy. *Id.*

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circumstances such that the grievance should still be heard on the merits?

Petitioner did *not* agree to the additional question. See pp. A-23, A-13 to A-14, *infra*.

The Court of Appeals, with one judge dissenting, reversed the district court. The majority opinion purported to apply this Court's directive in *United Paperworkers International Union* v. *Misco*, 108 S.Ct. 364 (1987) ("*Misco*"), that an arbitrator should not be overturned "as long as [he] is even arguably construing or applying the contract and acting within the scope of his authority." See p. A-3, *infra*. The Court of Appeals, remarking that it was "[t]aking the Supreme Court at its word," felt that it was compelled by *Misco* to uphold the arbitrator if it could concoct a "plausible" argument that favored the arbitrator's interpretation. *Id.*

In this case, the Court of Appeals felt that it could concoct such an argument. Creating an argument not even suggested by the arbitrator, the court speculated "that the parties may not have meant by the contract's word 'must' that failure to comply [with time limits] always, automatically bars a grievance, no matter what the circumstances." The court referred to cases where untimeliness was induced by the employer, thus creating "waiver, estoppel and equitable tolling" arguments, and asked rhetorically what "must" would mean if the employer had prevented timely filing "through trick." The court did not confront the fact this case involved no trick, no waiver, no estoppel and no equitable tolling, and therefore has nothing to do with the hypotheticals it posed. Nor did the court address the fact that the arbitrator made no such argument in reaching his conclusion. See pp. A-3 to A-4, *infra*.

The court went on to state that there was other "more specific" language which the parties "might" have used to make the agreement clearer. Accordingly, the court made the remarkable assertion that the parties did not "express clearly" their intentions when they said that grievances "must" be filed within specific time limits. See pp. A-4 to A-5, A-6, *infra*.

The court then avoided the agreement's further dictate that time limits "may only be *extended* by mutual written consent" by misquoting the contractual language. (Emphasis supplied.) The court rewrote this provision so that it read

"may only be *waived* by mutual written consent," and then speculated without any basis that it might apply only to "waivers by the parties" and not to an arbitrator's decision. (Emphasis supplied.) Again, this was an argument not even alluded to by the arbitrator. See p. A-5, *infra*.

The court completely ignored the contract's explicit prohibition stripping the arbitrator of "authority to alter this Agreement in whole or in part and to add to or delete any of its provisions or to render any award in conflict with its provisions." See p. A-37, *infra*.

The dissent was "frankly, hard put to see how the language of the contract could be more *un*ambiguous" (emphasis in original), and pointed out that "there is *no* dispute that when [the parties] said grievances 'must be' filed within 10 days and that extensions could 'only be' gained by mutual written consent they meant exactly that." P. A-8, *infra* (emphasis in original). The dissent stated that "when the language, which the parties fashioned at arms-length, is clear the arbitrator must rule upon it and not around it," and concluded that the arbitrator had "abandon[ed] the text" of the agreement and reached his conclusion "quite independently" of the language chosen by the parties. Pp. A-17, A-8 to A-9, *infra*. The dissent rejected the argument that it was necessary to more explicitly "spell . . . out . . . the consequences of a late filing" when the language makes clear that "a grievant . . . is *required* to file within a clearly specified time." P. A-11, *infra* (emphasis in original).

Finally, the dissent emphasized, this was not a case where the parties agreed that the arbitrator could "fashion a remedy" in the event of a so-called "*de minimis*" late filing, either in the contract or in the submission to arbitration. To the contrary, the contract provided that time limits could "only" be extended by "mutual written consent," which was not given, and the only agreed-upon submission was whether the grievance was "filed . . . timely in accordance with the collective bargaining agreement." See pp. A-12 to A-14, *infra*. See also pp. 4-5 n.1, *supra*.

Reasons For Granting The Writ

The decision of the Court of Appeals is an extraordinary, incorrect and dangerous reading of this Court's standards for the review of arbitral decisions. The majority of the Court of Appeals allowed an arbitrator to exceed his authority and to ignore plain contractual language. The majority reasoned that this Court left them no choice because they could think of language which would be even more specific and of situations of employer wrongdoing where the contractual language might not be literally applied. That sort of speculative reasoning, however, caused the Court of Appeals to negate the actual contractual language with argumentation not even alluded to, much less adopted by, the arbitrator. This Court could not have envisioned such a result. Moreover, the decision of the Court of Appeals effectively creates insurmountable obstacles to judicial review of arbitral decisions, no matter how egregiously those decisions violate the clear language used by the parties in their collective bargaining agreements.

Petitioner respectfully suggests that this is a case which may warrant summary reversal by this Court. At the very least, the decision of the Court of Appeals shows that this Court's decision in *Misco* requires further clarification.

I. The Court Of Appeals Decision, Which Ignores Plain Contractual Language And Limits On The Arbitrator's Authority, Is Contrary To The Decisions Of This Court.

In *Misco*, this Court stated that "as long as the arbitrator is even arguably construing or applying the contract," the reviewing court cannot overturn his decision. 108 S.Ct. at 371. At the same time, this Court made clear that the arbitrator must be "acting within the scope of his authority" and reemphasized its long-standing mandate that an arbitrator's decision "must draw its essence from the contract and cannot simply reflect the arbitrator's own notions of industrial justice." *Id.* See also *United Steelworkers of America* v.

Enterpise Wheel and Car Corp., 363 U.S. 593, 597 (1960). Thus, an arbitrator engaging in contract interpretation "may not ignore the plain language of the contract." 108 S.Ct. at 371.

In the decision below, the Court of Appeals flouted this Court's dictate that the plain language of the contract not be ignored. It rejected the basic tenet that an arbitrator's decision must be based on the contract language and not on the arbitrator's "own notions of industrial justice." The Court of Appeals in effect explained that it was, apparently against its better judgment, compelled by this Court to act in defiance of the logical reading of clear contractual language. It cast the blame when it said that it was simply "taking the Supreme Court at its word." P. A-3, *infra*. Driven by its reading of *Misco*, the Court of Appeals felt it could do nothing about the arbitrator's decision since it could "find" a "plausible argument" which it could "imagine" would be acceptable to "some judges or arbitrators." Pp. A-3, A-6, *infra*. The Court of Appeals' view distorts the teaching of this Court.

It is undisputed that the collective bargaining agreement said, in explicit terms, that a grievance of the type at issue here "*must* be presented in writing ~~to the~~ Dean of Faculty within ten (10) calendar days after the action to be grieved occurred." It was not so presented. It is also indisputable that the collective bargaining agreement provided that time limits "may *only* be extended by mutual written consent."[2] They were not so extended. The plain language of the agreement did *not* allow the grievance to proceed.

Where the language of the contract says that a grievance "must" be presented within ten days, and that this time limit may "*only* be extended by mutual written consent," it is no answer to say, as did the Court of Appeals, that the parties "might" have employed "other" even more specific language to deprive the arbitrator of the power to make "*de minimis*"

[2] The Court of Appeals mistakenly recited this provision as saying that "time limits 'may only be waived by mutual written consent.'" See pp. A-3, A-5, *infra*.

exceptions. To accept the apparent premise that "more specific" language must be inconceivable is, at bottom, to ignore this Court's dictate that the *actual* "plain language" of the agreement must be respected. The contract said that grievances *must* be filed within time limits, and that time limits could be extended *only* through the written consent of both parties. This language was clear and unambiguous, and governed the untimely grievance in this case. There was no need to say more.

The Court of Appeals likewise cannot justify its conclusion by stating that time limits may be relaxed when the party using the time limit as a defense has caused it to be missed ("waiver, estoppel, and equitable tolling"; "After all, would the time limit not have been extended had the employer, say, through trick, prevented the filing of the grievance"). Here, the petitioner did nothing to induce a late filing, and the Court of Appeals pointed to no case where a court (or arbitrator) nullified a statute of limitations (or contractual time limit) because of the negligence of a plaintiff (or grievant).

Similarly, the arbitrator's rationalization that he was simply "fashion[ing] a remedy" is frivolous. First of all, he had no such authority. The agreement authorized the arbitrator to decide the appropriate remedy for any contract violation by the employer; it did not empower the arbitrator to "remedy" a late filing. See p. A-37, *infra*. At the arbitration, also, the petitioner did not authorize the arbitrator to "remedy" the late filing of the grievance. See p. A-23, *infra;* pp. 4-5 n.1, *supra*.

The fundamental premise for judicial deference to arbitral decisions is therefore missing in this case. This Court reasoned in *Misco* that it was sufficient for an arbitrator to be "arguably construing" the contract when he was "acting within the scope of his authority," because the parties, "having authorized the arbitrator to give meaning to the language of the agreement," should not be heard to complain if the arbitrator misreads that agreement. 108 S.Ct. at 371. In this case, however, the parties patently did *not* give the arbitrator authority to "fashion" a

"remedy" for an untimely filing of a grievance.[3] There was no such authority in the agreement, and there was no such authority in the submission.

Moreover, the purported "remedy" created by the arbitrator was nothing more nor less than rewriting the contract to extend the time limits for filing a grievance. When the arbitrator concluded that he would allow a grievance to proceed despite the fact it was filed late, what was he doing other than granting an extension of the time limits for filing? Whether called a "remedy" or something else, this decision directly defied the contract language, which expressly provided that time limits "may only be extended by mutual written consent." P. A-37, *infra*. They could not be extended by arbitral rewriting of the agreement.

II. The Decision Of The Court Of Appeals Will Destabilize Collective Bargaining Agreements.

The arbitral process must, first and foremost, give meaning to the language which the parties have used in their collective bargaining agreement, because arbitration is "a matter of contract." *See United Steelworkers of America* v. *Warrior & Gulf Navigation Company*, 363 U.S. 574, 582 (1960). The Court of Appeals, however, has effectively given arbitrators unfettered power and stripped the contracting parties of control over the employment relationship once a dispute has gone to arbitration. Even if the parties have expressed their agreement in a fashion that any reasonable person would consider to be plain, clear and unambiguous, the Court of Appeals has expressly allowed an arbitrator to deviate from that agreement as long as a court can devise a "plausible contractual inter-

[3] This was not even a situation where it could be said that the parties implicitly agreed to let the arbitrator apply his experience, "knowledge of the common law of the shop," and personal judgment to a dispute over broadly crafted substantive terms (such as a "just cause" discipline issue). See *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581-82 (1960). See also p. A-13, *infra*.

pretation" that it could "imagine . . . some . . . arbitrators accepting." Indeed, as this case reveals, this "plausibility" standard can be applied even if the arbitrator did not, in the exercise of his judgment, rely on the so-called "plausible" arguments.

No "plausibility" standard is set forth in *Misco*. However, under the "plausibility" standard created by the Court of Appeals, the parties simply cannot know and enforce their agreement. When the obvious meaning of clear language can be ignored in favor of some post-hoc "plausible" interpretation, the language in an agreement becomes essentially meaningless and the stability which collective bargaining agreements are supposed to bring to the employment relationship is undermined. Even clear general language will be useless, as long as the reviewing court can imagine some more detailed language. Indeed, even the newly imagined more "precise" language will not suffice, because additional, even more precise language can always "plausibly" be imagined.

In this case, for example, the Court of Appeals said that the parties, who agreed that a grievance *must* be filed in timely fashion, and that time limits could *only* be extended by mutual consent, could also have said that in the absence of timely filing the grievance "shall be considered settled." Pp. A-4 to A-5, *infra*. But a plausible argument can easily be devised to find even that additional language insufficient; indeed, one need only follow the steps employed by the Court of Appeals in this case. First, one would certainly not think that the grievance would be considered settled if the employer had induced a late filing "say, through trick." One can say, therefore, that "shall be considered settled" "may not have meant" what it says. Second, even more specific language could be found—for example, the parties could have stated "the grievance shall be considered settled even if filed only a few days late, if there is no prejudice to the employer." Third, the language that grievances "shall be considered settled" is "less clear than may at first appear." The term "settled" could well refer to

mutually agreed-upon settlements by the parties and not to decisions by the arbitrator.[4]

There is nothing implausible in any of these steps; one could easily "imagine some arbitrators accepting" the argument. What this exercise reveals, however, is that the demand for ever-more-precise language could go on and on, layer upon layer, until collective bargaining agreements became so prolix and unwieldy as to foreclose every conceivable arbitral aberration from plain, simple and unequivocal general language. Alternatively, the parties could never know whether their agreement would be enforced, because, as the dissent below points out, "with lawyers trained in facile rhetoric, polemicists abound who can find anything arguable." P. A-8, *infra*.

The instant case is a classic, run-of-the-mill, unexcused and unconsented to failure to file a grievance on time, but it became an exercise in facile argumentation by the Court of Appeals. The problem with the Court of Appeals' approach is that "must" *does* mean "must," "only" *does* mean "only," and unless the plain language of the agreement is enforced as written, the arbitrator is not constrained by the limits agreed upon by the parties, but rather only by whatever limits may exist on the creativity of a reviewing court.

Conclusion

As the dissent noted below, "reason must still rule the use and intent of our juridical language." P. A-8, *infra*. In practice, the Court of Appeals would leave no situation where an

[4] The same analysis would apply to language in the agreement referring to there being a "final resolution" of a grievance when a grievance was not appealed in timely fashion. See p. A-5, *infra*. As the dissent noted, such language was necessary once a grievance had timely entered the grievance procedure, so that matters would not be "left up in the air," but was unnecessary where a grievance was not initially filed in timely fashion. See p. A-11, *infra*. In any event, even had such language been used with reference to the initial filing, the Court of Appeals could have devised the "plausible" argument that the language might apply only to a resolution by the parties' actions under the contract, and not limit an arbitrator who wished to create "remedies" for particular factual situations, for example, employer "trickery."

arbitrator would be subject to meaningful review, no matter how great the violence done to the arbitrator's actual authority or to the language of a collective bargaining agreement; a reviewing court could always imagine some more specific language which could have been used, or some outrageous factual situation where the language of the contract might "arguably" not be applied. The standard of review adopted by the Court of Appeals should not be allowed to stand, for in the end it can only undermine confidence in the certainty of collective bargaining agreements and in the legitimacy of the arbitral process.

Petitioner respectfully suggests that this Court may wish to consider summary reversal. In the alternative, this Court should issue a writ of certiorari to review the judgment and opinion of the Court of Appeals in this case, and to clarify the standards to be applied in judicial review of arbitral decisions under Section 301 of the Labor Management Relations Act.

Respectfully submitted,

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Dated: May 10, 1989

United States Court of Appeals
For the First Circuit

No. 88-1073

BERKLEE COLLEGE OF MUSIC,
PLAINTIFF, APPELLEE,

v.

BERKLEE CHAPTER OF THE MASSACHUSETTS FEDERATION OF TEACHERS, LOCAL 4412, AFT, AFL-CIO,
DEFENDANT, APPELLANT.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS
[HON. RYA W. ZOBEL, *U.S. District Judge*]

Before
CAMPBELL, *Chief Judge*,
BREYER, *Circuit Judge*,
and ACOSTA,* *District Judge*.

Jeffrey W. Jacobsen, Associate Counsel, for appellant.
Paul V. Lyons with whom *R. Michael Cassidy* and *Foley, Hoag & Eliot* were on brief for appellee.

September 27, 1988

* Of the District of Puerto Rico, sitting by designation.

BREYER, *Circuit Judge*. The appellant union, representing Joyce Lucia, a part-time teacher at the Berklee College of Music, asked an arbitrator to resolve Lucia's grievance against the school, a grievance based upon the College's refusal to hire Lucia full time. The College pointed out to the arbitrator that the collective bargaining agreement, which provided for arbitration, specified that grievances (like this one) that originate "from an action outside a particular department or division . . . must be presented in writing to the Dean of Faculty within ten (10) calendar days after the action to be grieved occurred." The College also pointed to the undisputed fact that the union did not file its written grievance with the College dean until 14 or 15 days after "the action to be grieved" (the denial of full-time status) occurred. The College asked the arbitrator to find that this procedural failing barred consideration of the merits of the grievance.

The arbitrator noted that the contract did not specify the legal consequence of a late filing; from that he inferred that he had the authority to overlook *de minimis* violations; and he found the present violation *de minimis* because the contract was in its first year, Lucia might have thought she was supposed to proceed under a different provision (for grievances originating *within* a department (with a fifteen day time limit, and the delay (4-5 days) did not harm anyone. The arbitrator therefore concluded that the merits of the grievance were arbitrable.

The College then asked the district court to set aside the arbitrator's order, 29 U.S.C. §185 (1982), as outside the limits of the authority granted him by the collective bargaining agreement. *See, e.g. United Paperworkers International Union* v. *Misco, Inc.*, 108 S. Ct. 364, 370-72 (1988); *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 599 (1960). The district court, finding the contractual language clear, granted the College's request. The union now appeals.

Since the time the district court decided this case, the Supreme Court has reiterated, in language stronger than previously used, that matters of contract interpretation are typically up to the arbitrator, not the courts. *Misco, supra.* The Supreme Court explained that an "arbitrator's award settling a dispute with respect to the interpretation or application of a labor agreement must draw its essence from the contract and cannot simply reflect the arbitrator's own notions of industrial justice. *But as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision.*" *Misco*, 108 S. Ct. at 371. We have characterized this language as specifying that any "exception" to the normal rule (that forbids the court to find an arbitrator's interpretation outside the authority delegated to him by the contract) is extremely narrow. *S.D. Warren Company* v. *United Paperworkers' International Union, AFL-CIO, Local 1069*, Slip Op. No. 87-1570 at 4-5 (1st Cir. May 19, 1988).

Only the narrowest of exceptions could exclude this arbitrator's interpretation, for not only does the contract say that the union "must" bring the grievance within 10 days, but it also says that "time limits" such as this one "may only be waived by mutual written consent," a consent that here was not forthcoming. Nonetheless, taking the Supreme Court at its word, we uphold the arbitrator's decision because we find a plausible argument that favors his interpretation. That argument runs as follows.

First, the contract rule in question concerns procedural time limits, and the Supreme Court has recently reiterated that "rules of procedure should be liberally construed and . . . 'mere technicalities' should not stand in the way of consideration of a case on its merits." *Torres* v. *Oakland Scavenger Company*, 56 U.S.L.W. 4740, 4741 (U.S. June 24, 1988) (quoting *Foman* v. *Davis*, 371 U.S. 178, 181 (1962)); *see, e.g., Houston* v. *Lack*, 56 U.S.L.W. 4728 (U.S. June 24, 1988). Sometimes, as with

the federal procedural rules, a separate rule specifically grants to a court the power to extend time limits imposed by other rules. *See, e.g.*, Fed. R. Civ. P. 6(b); Fed. R. App. P.26(b). In other instances, however, courts construe absolute-sounding language (say, in a statute of limitations) against a background of judicially created exceptions. *See, e.g., Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385, 392 (1982) (Title VII filing deadline ("A charge under this section *shall* be filed within one hundred and eight days. . . ." 42 U.S.C. §2000e-5(e) (1982) (emphasis added)), "like a statute of limitations, is subject to waiver, estoppel, and equitable tolling."); *Bailey* v. *Glover*, 88 U.S. (21 Wall.) 342, 348-49 (similar holding in respect to statute of limitations in Bankruptcy Act of 1867) *see generally Cerbone* v. *International Ladies' Garment Workers' Union*. 768 F.2d 45, 48-50 (explaining basis for tolling of filing deadline under the ADEA ("a charge *shall* be filed within 180 days. . ." 29 U.S.C. §626(d) (1982) (emphasis added)).

Arbitrators have read such exceptions into literally absolute-sounding time limits in labor contracts; sometimes they have done so in light of the parties' own history of practice, *Peru Foundry Co.* 73 LA 959, 960 (Sembower, 1979), but sometimes not, *International Paper Co.*, 82 LA 306 (Williams, 1984). This background suggests that the parties may not have meant by the contract's word "must" that failure to comply always, automatically bars a grievance, no matter what the circumstances. After all, would the time limit not have been extended had the employer, say, through trick, prevented the filing of the grievance? *See Cerbone, supra.*

Second, it is not difficult to find other, more specific language the parties might have used had they intended to deprive the arbitrator of the power to make *'de minimis'* exceptions. As the arbitrator here noted, some labor contracts do contain express provisions that noncompliance with a particular time limit means the grievance will "be considered settled." *See, e.g., Detroit Coil Company* v. *International Association of Machinists & Aerospace Workers, Lodge #82,*

594 F.2d 575 (6th Cir. 1979) (contract says, "Unless . . . the Company is notified within eight (8) working days . . . the grievance . . . shall be considered settled."). Indeed, the contract here at issue does contain such a provision in respect to *appeals* of grievances (in the pre-arbitration stage of the process). It says:

> The [Division Chairperson's] answer *will be deemed to be the final resolution* [of a Step 2 grievance] unless appealed within ten (10) calendar days from the date of the answer.

(Emphasis added.) This passage concerns grievances filed in accordance with Step 2, and appealed to Step 3. Similar language controls appeals from Step 1 to Step 2, and from Step 3 to Step 4. But, this language does not cover grievances, like this one, initiated at Step 3. The contract shows that the parties knew how to specify more strongly that missing a deadline would bar further consideration of the grievance. And, it is at least conceivable that one might want to hold a grievant more strictly to procedural rules once he has begun the grievance process.

Third, the contract's statement that the time limits "may only be waived by mutual written consent," is less clear than may at first appear. The union argues that the language is meant to apply to waivers *by the parties*, not remedies or exceptions applied by the arbitrator. It adds that the purpose of the clause is to prevent a grievant from claiming that the company *orally* waived the time limit; rather, the grievant, to show waiver, would have to produce a *written* waiver signed by the company. As so interpreted, this "exceptions" clause would not apply where the arbitrator, in effect, excused noncompliance not because of "waiver," but because of, say, inequity or the *de minimis* nature of the violation.

Fourth, the contract here differs significantly from that in *S.D. Warren*, where we applied the *Misco* exception. In *S.D. Warren*, the contract said that management had the "sole right" to dismiss a person who violated Mill Rule 7, and the arbitrator found that the employees had violated Mill Rule 7. We could not think of a way to express more clearly than through the use of the words "sole right" the fact that it was up to management, not the arbitrator, to decide whether or not to dismiss the employee. Here, by contrast, the arbitrator and the union point to a fairly obvious way (a way used elsewhere in this very contract) to express clearly that failure to meet the filing deadlines bars further consideration of a grievance.

Whether we would find these arguments convincing were it up to us to interpret the contract is beside the point. The question is whether these arguments make the arbitrator's interpretation plausible. We can imagine some judges or arbitrators accepting these arguments (without stretching the imagination very far). That being so, we must uphold the arbitrator's determination. *Misco*, *supra*.

The judgment of the district court is

Reversed.

ACOSTA, *District Judge* (dissenting). This case is like an optical illusion. When viewed from one perspective one sees one thing. When viewed from another something else is perceived. It appears that the majority's engrossment has been on the narrow scope of its reviewing authority under *Misco*.[1] I, on the other hand, see an exception in perceptable, if not bold, relief permitted even under the extremely narrow strictures of *Misco*.

The pertinent provisions of the collective bargaining agreement that are at the heart of this appeal are as follows:

> If the *grievance* originates from an action *outside* a particular department or division, it *must* be presented in writing to the dean of faculty within *ten (10) calendar days* after the action to be grieved occurred. Step 3 of Article XI ([emphasis] supplied).
>
> Time limits designated in this Article for processing grievances and for bringing a matter to arbitration may *only be extended by mutual written consent*. Subparagraph E of the General Provisions of Article XI ([emphasis] supplied).
>
> . . . The arbitrator may decide *only* whether the Employer violated this Agreement as *alleged* in the *grievance* and the appropriate remedy under this Agreement, if any. Subparagraph M of the General Provisions ([emphasis] supplied).
>
> . . . All rights and duties of both parties are *specifically expressed* in this Agreement and such expression is *all inclusive*. This Agreement constitutes the entire agreement between the parties and concludes collective bargaining for its terms, subject *only to a mutual agreement to amend or supplement this Agreement*. Subparagraph A of Article XXVII ([emphasis] supplied).

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[1] *United Paperworkers International Union* v. *Misco, Inc.*, ____ U.S. ____, 108 S.Ct. 364 (1988).

Taken together, I am, frankly, hard put to see how the language of the contract could be more *un*ambiguous. But, as the majority has indicated, as long as the arbitrator is "arguably" construing the contract "this is beside the point."[2] True, what is arguable to one person can be another person's gospel and with lawyers trained in facile rhetoric, polemicists abound who can find anything arguable. I for one, however, feel that reason must still rule the use and intent of our juridical language lest we fall prey to Lewis Carroll's famous exposition that the question is not what a word means but which is to be master: the word or its user.[3]

Since anything can be "arguable," the test must really be did the arbitrator give a reasonable reading to the text of the contract he construed and was he reasonably *qua* arguably acting *ex officio*. In the present case it was the bargainers, i.e. the parties, who mastered the text of the Agreement and there is *no* dispute that when they said grievances "must be" filed within 10 days and that extensions could "only be" gained by mutual written consent they meant exactly that. The arbitrator does not, indeed cannot, give this conclusory language any other meaning. Instead he abandons the text, sits *ex post facto* as a third party at the bargaining table, and says to the parties "when you said 'must' and 'only' you really didn't mean to include this case because you did not make it absolutely clear that anything filed past the deadline, no matter how 'harmless' the error, would not be considered." Thus the

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[2] It is important to note that while the majority almost exclusively relies on the "arguability" factor the *Misco* analysis actually involves *two* steps: (1) a determination of whether or not the arbitrator is "arguably construing or applying the contract"; *and* (2) a determination as to whether or not the arbitrator was acting within the scope of his authority. *Id.* at 371. The second leg is duscussed more fully later in this opinion.

[3] Lewis Carroll *Through the Looking Glass* Signet Classics, N.Y. (1960) p. 186-87. "When I use a word," Humpty Dumpty said, in rather a scornful tone, it means just what I choose it to mean—neither more nor less." "The question is," said Alice, "whether you *can* make words mean so many different things." "The question is," said Humpty Dumpty, "which is to be master—that's all."

arbitrator, quite independently, decided that the words of the Agreement meant what he chose them to mean, nothing more nor less.

The majority apparently feels compelled by *Misco* to crown the arbitrator master not only of the language of the Agreement but of the very subtle weighing of equitable principles such that a violation of clear contract provision will be disregarded because it is perceived by the arbitrator, without any explicit foundation, as minimal. The majority finds that this *ultra-contratu* act by the arbitrator was "arguably" within his prerogatives. But the contract, the main source of his power, does not say that an arbitrator can do what this one did. Nor does it allow for the quick side-stepping of clear unequivocal contractual language simply because the admitted violation was a matter of a few days tardiness. Implicitly, the majority would dethrone the arbitrator had the delay been more substantial.

The Arbitrator's Reasoning

The arbitrator acknowledged that Joyce Lucia filed her grievance four or five days late. Yet, in the face of all the above-cited provisions of the contract, the arbitrator inferred he had the authority to overlook "de minimis" violations because the contract did not specify the legal consequence of a late filing and besides (as the majority accepts as arguable) the grievant "*might* have *thought* she was *supposed* to proceed under a different provision" . . . since the contract was only in its first year. He found, further, that the 4-5 days delay "did not harm anyone." ([Emphasis] supplied).

First of all, what should be kept in mind is that we are not dealing with an adhesion-type contract. The Agreement was the hammered-out result between two knowledgeable parties sophisticated in collective bargaining. Further, Lucia was an officer of one of the parties. In the light of this I find it difficult to accept the nescient role of the grievant which the arbitrator has chosen to place her in.[4]

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[4] A kind of noble indulgence that has the savor of a "personal notion of industrial justice." *Misco*, 108 S.Ct. at 371.

Nor do I agree that "no one was harmed." Any party who is reasonably relying on the specific terms of a contract is "harmed" if that reliance later proves to be erroneous for whatever reason. It has its detrimental consequences in the time and expense involved in the arbitration process and possible adverse results which this appeal is obviously fighting to avoid.

Furthermore, I am not prepared to accept that an arbitrator should have the authority to resolve unambiguous, non-subject-matter procedural issues because a grievant "might" have been confused about which provision to proceed under. Nor do I understand the arbitrator's *ratio decidendi*. If the failure was the lack of specified consequences or not giving grievant adequate notice what difference then that it was only a four-day violation? If the delay had been forty days there would still have been no written consequences and no notice and thus no bar to the grievance under the arbitrator's formula. In other words, classifying the violation as "de minimis" does not support the main reason the arbitrator ruled in favor of grievant: that the text of the Agreement did not give grievant sufficient notice because it did not specify the penalty for late filings.

Therefore, the core issue from which all else apparently flows is whether the failure to specify the consequences of a missed deadline which deadline was stated in clear, straightforward language, authorizes an arbitrator to fashion a remedy. The optical illusion again comes into play when the majority concentrates its gaze on the fact that the Agreement specifies consequences for the inaction of the Division Chairperson (steps 1 and 2) and the Union (step 4) for grievances *within a particular department or division*[5]

[5] Step 1 provides in pertinent part: "... Within ten (10) calendar days of such grievance presentation, the *Department Chairperson* may meet with the grievant and a union representative and will give his/her written answer to the Union. If no written answer is given within ten (10) calendar days, the answer will be *deemed* to be a denial of the grievance...."

while no consequence is specified for grievances originating *outside the department or division*.[6] I see a different picture in that if a division chairperson or union fails to act, matters are pretty much left up in the air and, therefore, the specifying of a resulting consequence would be required. I do not see that the spelling out of the consequences of a late filing as being necessary in the case of a grievant who is *required* to file within a clearly specified time. If he or she files within the time specified it seems perfectly clear that the matter will proceed. If he or she does not, the matter does not proceed. In other words, it is totally unnecessary to specify the obvious. In any event, any disagreement I may have with the arbitrator's interpretation of the meaning and effect of the ten-day limitation is not the underlying basis of my dissent as I will point out further in this opinion.

I accept that an arbitrator's fact-finding may be improvident, erroneous or "silly"[7] and that he is even entitled to refuse to consider evidence[8] if his reasoning is "arguable" and his decision is not procured by fraud or dishonesty. What I have great difficulty in countenancing, however, is that an arbitrator may ignore the plain language of a collective

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Step 2 provides in part: "... The *Division Chairperson* shall give a written answer within five (5) calendar days after said meeting. If no written answer is given within five (5) calendar days, the answer will be *deemed* to be a denial of the grievance...."

Step 4 provides in part: "The Union may submit the written grievance to arbitration within thirty (30) calendar days of such meeting. If the Union does not timely submit the grievance to arbitration, the decision of Step 3 will be final...."

[6] Step 3 provides in part: "...If the grievance originates from an action *outside a particular department or division*, it *must* be presented *in writing* to the Dean of Faculty within ten (10) calendar days after the action to be grieved occurred...." ([Emphasis] supplied.)

[7] *Misco*, 108 S.Ct. at 371

[8] Though the Supreme Court found that "evidentiary matters were *otherwise* left to the arbitrator" it gave the ineluctible impression that the arbitrator would have to strictly abide by the clearly enunciated "ground rules" in the contract which forbade him to consider hearsay evidence. *Id.*

bargaining agreement where 1) the parties have not authorized him to give meaning to the language of the agreement[9]; 2) where the "procedural" question of time limitation did not "grow out of the dispute" nor have a "bearing" on its final disposition[10]; and 3) where there is a question of "explicit, well defined, and dominant" public policy exemplified by "laws and legal precedents" which is ultimately one for resolution by the Court.[11]

Authority Under the Contract

The Supreme Court has summed up the state of the law with respect to the authority of an arbitrator:

> /T/he arbitrator's award settling a dispute with respect to the interpretation or application of a labor agreement must draw its essence from the contract and cannot simply reflect the arbitrator's own notions of industrial justice. But as long as the arbitrator is *even arguably construing* or applying *the contract and acting within the scope of his authority*, that a court is convinced he committed serious error does not suffice to overturn his decision. ([Emphasis] supplied)

Misco, 108 S.Ct. at 371.

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[9] *Misco*, 108 S.Ct. at 364, citing *Steelworkers* v. *Enterprise Wheel Car Corp.*, 363 U.S. at 599, 80 S.Ct. at 1362 ("the arbitrator may not ignore the plain language of the contract; *but the parties having authorized the arbitrator to give meaning to the language of the agreement*, a court should not reject an award on the ground that the arbitrator misread the contract.") (Emphasis added.) *Steelworkers* dealt with the authorized interpretation of the phrase "unjust suspension" found in a collective bargaining agreement. It is distinguishable from the present case not only because the statement of the issue that the parties in *Steelworkers* presented to the arbitrator clearly gave him wide interpretative powers but also because the determination of whether or not the claimant was unjustly suspended grew out of the dispute and had a heavy bearing on its final disposition. *See infra* note 10. Therefore, *Steelworkers* cannot be seen as undermining the basic rule that an arbitrator does not have a free license to (mis)interpret clear and unambiguous language set forth in a contract.

[10] *Misco*, 108 S.Ct at 372.

[11] *Misco*, 108 S.Ct. at 373; *W.R. Grace & Co* v. *Rubber Workers*, 461 U.S. 757, 766; 103 S.Ct. 2177, 2183 (1983).

Nowhere do I find in the contract at issue that the arbitrator is to give meaning to the language concerning the time limits. On the contrary, the combined reading of General Provisions E and M of Article XI should have been sufficient to inform him he would be out of bounds to entertain any consideration of this matter. Nor does the record reflect that the *parties* authorized the arbitrator to consider the issue as contemplated by the Supreme Court in *Steelworkers* v. *Enterprise Wheel Car, Corp., see supra* note 9.

The parties *did* agree that the arbitrator should consider the following issue:

> Was the grievance filed in this matter timely in accordance with the collective bargaining agreement? (App. at 41.)

Thus, the simple matter before the arbitrator was to: (1) look at the filing date of the grievance ("grievance filed") and (2) compare that date with the time limits proscribed in the Agreement ("in accordance with the collective bargaining agreement"); to then determine if the grievance was "timely." Thus, the text of this statement of the issue clearly shows that this, unlike *Steelworkers*, was not a case where the parties allowed the arbitrator to "give meaning" to the ambiguous language of a contract (such as "unjust suspension" or "good cause" for firing) but rather the parties meant the arbitrator to apply the specific terms of the contract to the undisputed facts of the case at hand.

That this was the agreement of the parties as to the issue cannot be doubted because the arbitrator, after transcribing the above statement of the issue, went on to say: "The Union suggested an additional question, *which the College did not agree to*. That question was:

> In the event the grievance was not filed timely were there extenuating circumstances such that the grievance should still be heard on the merits?

Appendix at 41. (Emphasis added.)

Thus the arbitrator acted not pursuant to the authority given by both parties but rather upon the unilateral request by one party which he acknowledged was rejected by the other. Absent any other source of authority that can be gained from the contract, the arbitrator was expressly limited to a consideration of the timeliness of the grievance and could not entertain any "extenuating circumstances" or make other equitable determinations. The contract was clear on its face. Accordingly, there was no need to resort to extrinsic evidence. Here the arbitrator obviously and unjustly overstepped that limit and we should strike his decision as *ultra vires*.

The Procedural Question Issue

Misco also added, consistent with its observation in *John Wiley & Sons, Inc.* v. *Livingston*, 376 U.S. 543, 557; 84 S.Ct. 909, 918; 11 L.Ed.2d 898 (1964), "that when the subject matter of a dispute is arbitrable, 'procedural' questions which *grow out of the dispute* and *bear on its final disposition* are to be left to the arbitrators." (emphasis added) *Misco*, 108 S.Ct. at 372.

I agree that intertwined issues of "substance" and "procedure" growing out of a single dispute should not be carved up between two different forums and that "once it is determined that the parties are obligated to submit the *subject matter* of a dispute to arbitration, 'procedural' questions which *grow out of the dispute* and *have a bearing on its final disposition* should be left to the arbitrator." ([Emphasis] supplied.) *John Wiley & Sons, Inc.*, 376 U.S. at 557. I submit, however, that the ten (10) day time limit is not a part of the "subject matter" of the dispute nor does it "bear" on its final disposition.

The Agreement very clearly states that "the arbitrator may decide *only* whether the employer violated this Agreement *as alleged* in the *grievance* and the appropriate remedy under this Agreement, if any."[12] The grievance or subject matter of this case did not grow out of a dispute about whether a 4-5 days delay should be overlooked. The subject matter arose out of the denial of Lucia's request to gain full-time status in the Voice Department. Therefore, the time limit requirement is not a proper subject within the scope of the arbitrator's authority nor is it intertwined with any issues of a substantive nature.

The Question of Public Policy

Acknowledging its holding in *W.R. Grace and Co.* v. *Rubber Workers*, 461 U.S. 757; 103 S.Ct. 2177; 76 L.Ed.2d 298 (1983), the Supreme Court has recognized that the courts may not enforce collective bargaining agreements that are contrary to public policy. It cautioned, however, "that a court's refusal to enforce an arbitrator's interpretation of such contracts is limited to situations where the contract as interpreted would violate 'some explicit public policy that is' well defined and dominant, and is to be ascertained by reference to the laws and legal precedents and not from general considerations of *supposed* public interests." *Misco*, 108 S.Ct. at 373 ([emphasis] supplied).

Despite the Supreme Court's ruling in *Misco* that it did not recognize an unsubstantiated public policy against the operation of dangerous machinery by persons under the influence of drugs or alcohol[13] the law continues to be that "a court may not enforce a collective bargaining agreement that is contrary to public policy and that the question of public policy is ultimately one for resolution by the courts." *W.R. Grace*, 461 U.S. at 766; 103 S.Ct. at 2183; 76 L.Ed.2d at 299.

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[12] Last sentence of Subparagraph M of the General Provisions.

[13] 108 S.Ct. at 375, 6.

I submit, at the risk of sounding trite, that a provision in a contract between parties which provides in plain, certain language that a filing *must* be within a specified term and that the time limitation may not be extended except by mutual written consent is a well defined, dominant expression of public policy which may be ascertained by reference to laws and legal precedents and arises from a general consideration of a real public interest. In short, in unabashed truistic terms, the solemnity and integrity of an agreement between two or more competent parties creating an obligation to do or not to do a particular thing is of great public importance in our jurisprudential history. I find the contract says what it means and means what it says and fits quite comfortably within the narrow confines of a *Misco* exception.

It seems to me, also, that one of the results of the majority opinion is that an arbitrator has an even wider latititude of power of interpretation than an Article III judge. While an Article III judge may construe the absolute-sounding language of a statute of limitations where there is evidence of a waiver or grounds for estoppel or equitable tolling, the arbitrator is free to construe a specific time limitation where none of these conditions exist. With respect to a waiver there is no indication of any "history or practice" of the parties to sustain such a claim.[14] The majority states that "this background/where arbitrators have read such exceptions into literally absolute-sounding time limits in labor contracts/ *suggests* that the parties *may* not have meant by the contract's word 'must' that failure to comply always, automatically bars a grievance, no matter what the circumstances." The majority then asks "would the time limit not have been extended had the employer, say, through trick, prevented the filing of the grievance?" But in our case there was no fraud, no dishonesty,

[14] *Peru Foundry Co.*, 73 L.A. 959, 960 (Sembower, 1979).

no waiver, no grounds for estoppel or equitable tolling, and no "trick."[15]

If we are to stretch the *Misco* rule of arguability to include an arbitrator's uninvited and unauthorized incursion into the supposed equities of a case we are undermining the very process, i.e., collective bargaining and arbitration, that *Misco* sought to uphold. Such a result does not withstand logic for it cannot be reasonably said, and thus be "arguable," that an abitrator can go beyond the intent of an agreement, when that intent is first and foremost embodied, indeed enshrined, in the explicit, straightforward language the parties bargained for.

I submit that the arbitrator in this case was not only acting outside the scope of his authority but that the Court by sanctioning his actions is opening up a "Pandora's box" of nettlesome questions. Would a delay of 7 or 8 days under the exact circumstances of this case be acceptable as "de minimis"? How about 16 or 17 days? I would venture that there are few, if any, who would accept a delay of 40 days. This being the case, on what basis then would we disregard the wide latitude granted to the arbitrator by the majority? If we say a delay of 40 days is obviously not "de minimis" and constitutes serious error do we not run afoul of *Misco* which emphatically states that even though "a court is *convinced* he /the arbitrator/ committed *serious error* does not suffice to overturn his decision."[16] It no longer suffices to say that when the language, which the parties fashioned at arms-length, is clear the arbitrator must rule upon it and not around it. The effect is to give to the arbitrator the authority to make decisions that the parties never envisioned nor intended.

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[15] A discussion of the *possibilities* (of fraud, waiver, etc.) in the light of the plain facts ultimately results in bootstrap reasoning to save an otherwise unsupported conclusion.

[16] *Misco*, 108 S.Ct. at 371.

Conclusion

In Warren II,[17] the contract said that the management had the "sole right" to dismiss a person who violated Mill Rule 7. The arbitrator found that the employees had violated Mill Rule 7. As the majority states regarding *Warren II*: "We could not think of a way to express more clearly than through the use of the words 'sole right' the fact that it was up to management, not the arbitrator, to decide whether or not to dismiss the employee." Similarly, given that it was not necessary to spell out the consequences for failing to file within the ten-day limit and given that the time limitation was not the subject matter of the dispute thereby placing the arbitrator outside the scope of his authority, I too cannot think of a way to express more clearly than through the use of the words "within ten calendar days" and "time limits...may only be extended by mutual written consent" the fact that the District Court's decision was correct.

I would affirm.

[17] *S.D. Warren Company* v. *United Paperworkers International Union*, slip op. No. 87-1570 (1st Cir. May 19, 1988).

APPENDIX
Faculty Contract Agreement
1986-89

STEP 3.

If the grievance is appealed from Step 2, the Union must present the grievance in writing within ten (10) calendar days from the receipt of the Division Chairperson's answer, to the Dean of Faculty. If the grievance originates from an action outside a particular Department or Division, it must be presented in writing to the Dean of Faculty within ten (10) calendar days after the action to be grieved occurred. Within fifteen (15) calendar days of the receipt of the written grievance, the Dean of Faculty or designee may meet with the grievant and Union President or designated elected official of the Union to discuss the grievance. The Dean of Faculty or designee shall give a written answer within fifteen (15) calendar days after said meeting. If no written answer is given within fifteen (15) calendar days, the answer will be deemed to be a denial of the grievance. The answer will be deemed to be the final resolution unless appealed to Step 4 within fifteen (15) calendar days form the date of the answer.

* * *

GENERAL PROVISIONS

* * *

E. Time limits designated in this Article for processing grievances and for bringing a matter to arbitration may only be extended by mutual written consent.

United States District Court
District of Massachusetts

Civil Action No. 87-1441-Z

BERKLEE COLLEGE OF MUSIC

v.

BERKLEE CHAPTER OF THE MASSACHUSETTS FEDERATION OF TEACHERS, LOCAL 4412, AFT, AFL-CIO

MEMORANDUM OF DECISION

ZOBEL, D.J.

Plaintiff and defendant are parties to a collective-bargaining agreement ("Agreement") which provides for the processing of grievances in accordance with prescribed procedures and time limits. Pursuant to the Agreement, the parties submitted to arbitration the grievance of Joyce Lucia, a part-time teacher in the Voice Department, whose request to gain full-time status had been denied. Because plaintiff deemed the grievance to have been filed late, the parties agreed to bifurcate the proceedings and the only issue submitted initially was whether the grievance was "filed timely in accordance with the . . . agreement." The arbitrator decided that the Union had not complied with the Agreement and that the grievance was not timely. Nevertheless he ordered a second-stage hearing on the merits because that violation was "technical" and "*de minimis*"; and where the Agreement does not specify the consequence of a missed deadline the "arbitrator has the power to fashion a remedy which is compensatory, not punitive."

The college brought this action to set aside the award as being beyond the arbitrator's authority. Both parties have moved for summary judgment. Plaintiff's motion is allowed.

The parties agree that the court's power is narrow and specifically that it may vacate the arbitrator's award only

where the latter does not "draw its essence from the bargaining agreement." *W.R. Grace and Co.* v. *Local Union 759, Int'l Union of United Rubber*, 461 U.S. 757, 764 (1983); *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 599 (1960). *See also Bettencourt* v. *Boston Edison Co.*, 560 F.2d 1045, 1049 (1st Cir. 1977).

As noted, the Agreement sets forth time limits. It also provides that the "time limits....for processing grievances...may only be extended by mutual written consent," and that "neither the parties nor the arbitrator shall have the authority to alter this Agreement in whole or in part or to add to or delete any of its provisions or to render any award in conflict with its provisions." The award unquestionably modifies the express and precise language of Article XI, the grievance procedure. While the Agreement does not explicitly spell out that failure to file on time is deemed to be a waiver of the grievance, that is, at least, implicit in the requirement of written mutually-agreed extensions. Having determined that the union had failed to adhere to the filing deadlines of the Agreement, the arbitrator was not then free to "interpret" unambiguous language to fashion a remedy. *See S.D. Warren Co.* v. *United Paperworkers' Int'l Union, Local 1069*, 815 F.2d 178 (1st Cir. 1987); *Detroit Coil Co.* v. *Int'l Ass'n of Machinists & Aerospace Workers, Lodge 82*, 594 F.2d 575 (6th Cir.), *cert. denied*, 444 U.S. 840 (1979).[1]

Plaintiff also moves for summary judgment on defendant's counterclaim which seeks damages of $250, one-half of the amount assessed by the arbitrator for late cancellation of the hearing date to consider the merits of the grievance. Contributions to the cost of arbitration are governed by the Agreement and any dispute with respect thereto is to be resolved by the arbitrator. Because this decision by the arbitrator is clearly within his authority, I have no jurisdiction to disturb it.

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[1] In reviewing the district court's award of fees, the United States Court of Appeals for the District of Columbia Circuit criticized the outcome of *Detroit Coil* while, however, disapproving an arbitrator's award that ignored the express provisions of the agreement. *Washington Hosp. Center* v. *Service Employees Int'l Union, Local 722*, 746 F.2d 1503 (D.C. Cir. 1984).

For the reasons set forth herein, defendant's motion for summary judgment is denied. Plaintiff's motion is allowed. Judgment may be entered for plaintiff on the complaint, vacating the arbitrator's award, and on the counterclaim.

November 19, 1987

/s/ RYA W. ZOBEL
District Judge

In the Matter of the Arbitration between

BERKLEE CHAPTER OF THE MASSACHUSETTS FEDERATION OF TEACHERS, LOCAL 4412, AFT, AFL-CIO

and

BERKLEE COLLEGE OF MUSIC

JOYCE LUCIA GRIEVANCE

OPINION AND AWARD

The parites submitted this case to arbitration pursuant to their collective bargaining agreement effective April 22, 1986. They agreed to bifurcate the proceedings and to first present the issue of the arbitrability of the grievance. A hearing was held at which Jeffrey W. Jacobsen, Esq., appeared on behalf of the Union and Paul V. Lyons, Esq., appeared on behalf of the College. Post-hearing briefs were received from the parties by May 4, 1987.

ISSUE

The parties agreed on the following formulation of the issue:

> Was the grievance filed in this matter filed timely in accordance with the collective bargaining agreement?

The Union suggested an additional question, which the College did not agree to. That question was:

> In the event the grievance was not filed timely were there extenuating circumstances such that the grievance should still be heard on the merits?

BACKGROUND

Joyce Lucia had been employed by the College as a part-time teacher in the Voice Department from January, 1978 until June, 1981. She changed to full-time status for the 1981-82 and 1982-83 school years, after which, at her own request, she reverted to part-time status.

In April, 1985, the Union was certified as the bargaining representative of a unit of full-time faculty and a unit of part-time faculty at the College. Lucia became the vice president of the part-time unit, the highest Union office held by a

part-time faculty member. Lucia also served as a member of the bargaining team. The Union went on strike for one week in April, 1986. The strike ended on April 22 when the current collective bargaining agreement was signed.

On April 24 Lucia wrote to Ken Greenhouse, the chairperson of the Voice Department, requesting that the process be initiated to convert her status to full-time. Greenhouse wrote to Larry Monroe, the division chairperson, on April 25 recommending that Lucia be made a full-time faculty member for the fall, 1986 semester. On June 3, Lucia was told by Greenhouse that her Performance Studies courses had "not populated" sufficiently to give her full-time status. He passed along Monroe's suggestion that Lucia should contact the Ear Training Department to see if teaching hours were available there. Lucia called Steve Plummer, the chairperson of Ear Training, that same day. Plummer told her he would know that week which classes were available. Lucia called Plummer again on June 9 and he stated that he was sending Monroe a communication indicating his department had hours available for Lucia. Lucia sent Monroe a formal application for the various hours of teaching which would support a full-time position.

Lucia was called to a meeting with Monroe and Greenhouse on June 26. Monroe explained that he could neither recommend nor reject Lucia for full-time teaching at that time. He demonstrated to Lucia that sufficient hours did not then exist to enable her to change her status. Monroe cited a number of situations which, if they came to pass, might give her enough hours. Lucia asked when these situations might come to pass. Monroe replied that they could happen during the summer, or even during the semester. Lucia inquired if she had to reapply for full-time status and Monroe did not indicate that she had to.

Sometime soon after her June 26 meeting, Lucia received the following letter dated June 27 from Warrick Carter, dean of faculty:

> After thorough consideration regarding the college's needs for salaried faculty positions on the part of the Department and Division Chairmen and the President and I, I regret to inform you that your request for a salaried position cannot be approved at this time.
>
> Enclosed is your contract for the 1986-1987 school year at the hourly rate and rank indicated.

The contract was for the part-time position of assistant professor for the 1986-87 school year. Lucia spoke with Union President Michael Scott, who advised her to sign the contract and return it. Scott gave this advice to all part-time faculty who were seeking, but had not yet been granted, full-time positions. Aware that a new contract would be issued if her status subsequently changed, Lucia submitted her signed contract on July 23.

Not having heard anything further and concerned that she would not get a full-time position, Lucia contacted Carter in late August. At a meeting on August 27 Carter made it clear that Lucia would not be given full-time status for the fall semester. He stated that if a full-time position opened up, applicants would be taken from inside and outside the department and Lucia would have to apply again.

The parties' contract contains in article XI a four step grievance procedure, ending in arbitration. The contract provides in relevant part:

> §A. For the purpose of this Agreement, the term "grievance" is defined as an allegation by the Union that there has been a breach or misapplication or misinterpretation of the expressed term(s) of this Agreement which are subject to the Grievance Procedure. . .
>
> 1. If the matter to be grieved originated from a particular Departmental action, the grievance must be filed with that Department Chairperson at Step 1.

2. If the matter to be grieved originated from a particular Divisional action, the grievance must be filed with that Division Chairperson at Step 2.

3. If the matter to be grieved originated from an action outside a particular Department or Division, the grievance must be filed with the Dean of Faculty at Step 3.

Step 1:

The Union or a unit faculty member(s), through the Union, will present in writing the grievance to the Department Chairperson involved within fifteen (15) calendar days after the action to be grieved occurred. . .

Step 2:

. . . If the grievance originates from an action in a Division, it must be presented in writing to the Division Chairperson within ten (10) calendar days after the action to be grieved occurred. . .

Step 3:

. . . If the grievance originates from an action ouside a particular Department or Division, it must be presented in writing to the Dean of Faculty within ten (10) calendar days after the action to be grieved occurred.

Step 4:

. . . A grievance may be submitted to arbitration unless this Agreement provides otherwise.

[Each of the steps provides that if the grievance is not answered within a designated time frame, the grievance will be deemed denied; and that if an answer is not appealed to the next step within the stated time frame, the answer is deemed final.]

§E. Time limits designated in this Article for processing grievances and for bringing a matter to arbitration may only be extended by mutual written consent.

The fall semester commenced after Labor Day on September 2, with registration, although classes did not begin until September 8. Part-time faculty were not required to be at

registration, but some full-time faculty, including Scott, were present for all or most of the registration period. Lucia sought out Scott after classes had commenced and spoke about filing a grievance. She believed that the proper filing point was Step 1, since the initial action was a decision of the departmental chairperson. Scott assumed that since she had last met with Carter, the grievance should be filed at Step 3. Scott indicated he would file a grievance immediately, and also suggested that since Carter had not written a letter confirming the August 27 conversation, Lucia should send the dean such a letter.

Lucia submitted to Carter a letter dated September 10, which was received by Carter's office that day. The letter stated:

> I met with you on Wednesday, August 27, 1986 regarding the College's denial of my applicaton for fulltime status, to see if this decision might be changed. At that meeting you told me that the College was not hiring any more fulltime teachers.
>
> It is now my understanding from our conversation that you will not change my status—as you stated that Berklee does not plan to hire any fulltime teachers before the 87/88 school year.

Scott prepared a letter on Lucia's behalf that same day, in essence alleging that the denial of Lucia's request for full-time status violated article VIII and the Memorandum of Understanding regarding harassment. The letter was identified as a Step 3 grievance and was addressed to Carter. Scott could not recall how this particular letter was sent, although he testified that his normal procedure was to hand-deliver letters to the mailbox of the appropriate administrator. Carter testified that his mail is picked up from the mailroom twice a day, the last time being between 3:00 and 3:30. The dean's copy of the letter was date stamped as having been received in his office on September 11.

Article VIII, §B states:

> The Employer and the Union agree that no faculty member covered by this Agreement will be discriminated against because of membership in, or lack of membership in, or activities on behalf of or against the Union.

The Memorandum of Understanding cited in the grievance was executed on April 22, 1986 and is included, along with other memoranda, at the end of the booklet entitled "Faculty Contract Agreement 1986-89." The various memoranda are not listed in the table of contents, where the contract articles are set forth. The Memorandum of Understanding regarding harassment defines harassment as ". . . any verbal, physical or psychological action by a faculty member against another faculty member, a student, a staff member or member of the College administration." It specifies as unacceptable, harassment on the basis of race; color; religion; national origin; age; sex; handicap; Union membership and activity or lack of membership and activity, including in regards to the strike.

The Memorandum of Understanding states that a person who believes he or she was harassed may contact the appropriate department chairperson, dean of faculty or dean of students to attempt a resolution of the claim. If not satisfied, the complainant may request a hearing before the Harassment Committee, composed of the dean of faculty, the president of the Union, and the College's director of personnel. This Committee

> . . . will hear the complaint against the faculty member . . .
>
> The Harassment Committee's decision . . . will be final. If harassment is found, the Harassment Committee will recommend to the President of the College what, if any, disciplinary action should be taken against the faculty member.
>
> The President of the College, after review, may impose any disciplinary action which he determines to be appropriate so long as such discipline is not greater than the discipline recommended by the Harassment Committee. Such decision is final.

> The decisions of the Harassment Committee and the President of the College will be final and not subject to Article XI, Grievance Procedures, of the collective bargaining agreement between the Employer and the Union.

Carter responded to the grievance on September 18. He denied the grievance, stating that it had not been filed in a timely fashion, that the Memorandum of Understanding regarding harassment does not pertain to claims against the College by a faculty member, and that Lucia had not been denied full-time status because of Union membership or activity. The grievance was subsequently appealed to arbitration.

COLLEGE POSITION

The decision to not offer Lucia full-time status was made by Carter, the dean of faculty. Any grievance challenging this action had to be filed at Step 3 within ten days of the grievable event. That event occurred on June 27, when Lucia received Carter's letter notifying her of her part-time status for 1986-87. The grievance was not filed until September 11, and was not timely, even if the grievable event were the August 27 meeting. The contract states that time limits may only be extended by mutual written consent and bars the arbitrator from altering the agreement. Hence, even if extraordinary circumstances existed, the arbitrator could not extend the filing deadline. No such circumstances were present, however, since Lucia was a Union officer familiar with the contract. Finally, the claim about a violation of the Memorandum of Understanding regarding harassment is not subject to these proceedings. The Memorandum of Understanding is not part of the contract; it pertains to harassment by a faculty member, not the College; and an exclusive procedure, separate and apart from the grievance procedure, has been established to handle harassment allegations.

UNION POSITION

The relevant date in this case is August 27, since that was the first time Lucia received any definitive indication that her request for full-time status had been denied. Up until that time, Lucia had received either encouraging or equivocal responses from the various administrators. That she signed her part-time contract is of no consequence, since she could not be expected to jeopardize her part-time employment while waiting for a final answer on her request to return to full-time. The grievance was ultimately filed at the third step on September 10. Had it been filed as a Step 1 grievance, it would have been within the fifteen day time period. At worst, the grievance was two days beyond the ten day limit. This minor delay should be excused. The contract was new and the grievant and Union officers inexperienced in processing a grievance under the complex procedures. Although the contract speaks of calendar days, it should be noted that Labor Day and registration fell within the time period. Clearly this was not an example of gross negligence in processing the grievance. For these reasons the grievance should be deemed to have been timely filed and the matter should be heard on its merits.

OPINION

The first determination which must be made is when the greivable event occurred; that is, when Lucia knew or should have known that the College had rejected her request to be made a full-time faculty member. Although Lucia was given an initial indication she would not be made full-time for the 1986-87 academic year earlier, she did not receive a final answer from the College until August 27. After receiving a favorable recommendation from her department chairperson in April, she was told at the end of June by the division chairperson that he could neither recommend nor reject her for full full-time teaching at that time. Monroe essentially

stated that it was possible the situation could change, and her application remained pending in the meantime.

The letter dated June 27 from Carter reinforced the provisional non-approval of her request. By stating her request could not be approved "at this time," the dean gave the impression that it had not been rejected, and might be approved in the near future. He did not say anything like "apply again next year," which would have given the clear message that her request for the 1986-87 was no longer viable. It was not until Lucia met with Carter on August 27 that Lucia was definitively notified that the College's earlier tentative decision would not be changed. When Carter indicated that should a full-time vacancy arise Lucia would have to submit a new application, it became apparent that the College had rejected, rather than deferred, her request to become full time.

Lucia's grievance was submitted fourteen or fifteen days thereafter at the third step. Grievances filed at Step 3 are governed by a ten day deadline. Clearly Lucia's grievance missed the deadline by a few days, although it would have been within a Step 1 grievance deadline. The question is what consequences should flow from the late filing.

Unlike some contracts, the parties' agreement does not state that if the initial filing deadline is missed the grievance is deemed waived. Under such contracts, an arbitrator is without authority to go beyond a rigid application of the deadline and determine an appropriate remedy for a contract breach. Where the consequences of a missed deadline have not been specified, however, an arbitrator is in the same position as when considering any other deviation from contractual requirements, be it by the College, the Union, or an employee. An arbitrator has the power to fashion a remedy which is compensatory, not punitive. An arbitrator must look at and respond to the harm suffered by the College and the motivation of, and advantage gained by, the Union or employee.

In this case it is apparent the College suffered no prejudice from the four or five day delay in the submission of the

grievance. The relevant facts were equally accessible and no actions were taken by the College in reliance on the lack of a greivance ten days after the August 27 meeting. The potential liability of the College remained precisely the same.

On the other side, the Union and employee were not acting in bad faith or to attain any advantage. There was some confusion about whether the grievance was appropriately filed at Step 1 or 3. Lucia was under the belief that since the process for seeking full-time status was initiated at the departmental level, the grievance challenging the denial of the request should also be initiated at that level. In that case, the applicable time limit would have been fifteen days. Lucia would have had no reason to seek out the Union president over the Labor Day weekend or during registration week, when she was not required to be at the College. Further, Lucia and the Union neither sought nor gained any benefit by not filing the grievance until September 10 or 11.

Because no harm flowed from the technical violation of the contract, the breach of the contractual requirement must be termed *de minimis*. No remedy for the minor delay in filing is appropriate, and so the basic grievance may proceed to arbitration without limitation.

As part of its claim, the Union asserted that there had been a violation of the Memorandum of Understanding regarding harassment. This aspect of the claim is not arbitrable. The Memorandum of Understanding establishes an exclusive procedure for dealing with allegations of harassment and expressly states that such claims are not subject to the contractual grievance procedure. Hence, when the arbitration hearing resumes on June 2 on the merits of Lucia's grievance, no evidence pertaining to the claim under the Memorandum of Understanding will be accepted.

AWARD

The grievance filed in this manner was not filed timely in accordance with the collective bargaining agreement. Because of the *de minimis* nature of this violation, no remedy is appropriate. The grievance is therefore arbitrable, insofar as it alleges a violation of article VIII of the contract.

/s/ MARK L. IRVINGS
Mark L. Irvings

May 11, 1987

United States Court of Appeals
For the First Circuit

No. 88-1073

BERKLEE COLLEGE OF MUSIC,
PLAINTIFF, APPELLEE,
v.
BERKLEE CHAPTER OF THE MASSACHUSETTS FEDERATION OF TEACHERS, LOCAL 4412, AFT, AFL-CIO
DEFENDANT, APPELLANT.

JUDGMENT

ENTERED: September 27, 1988

This cause of action came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows:

The judgment of the district court is reversed.

Costs to appellant.

By the Court:
FRANCIS P. SCIGLIANO
Clerk

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DEFENDANT, APPELLANT.

Before
CAMPBELL, *Chief Judge*,
BREYER, *Circuit Judge*,
and ACOSTA,* *District Judge*.

ORDER OF THE COURT

ENTERED: February 9, 1989

The panel of judges that rendered the decision in this case, having treated the petition for rehearing en banc, also as a request for a petition for rehearing before the panel that heard the case,

It is ordered that a petition for rehearing be, and the same hereby is, denied.

By the Court:
FRANCIS P. SCIGLIANO
Clerk

* Of the District of Puerto Rico, sitting by designation.

United States Court of Appeals
For the First Circuit

No. 88-1073

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PLAINTIFF, APPELLEE,

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BERKLEE CHAPTER OF THE MASSACHUSETTS FEDERATION OF TEACHERS, LOCAL 4412, AFT, AFL-CIO,
DEFENDANT, APPELLANT.

Before
CAMPBELL, *Chief Judge.*
BOWNES, BREYER, TORRUELLA AND SELYA, *Circuit Judges.*

ORDER OF THE COURT

ENTERED: February 9, 1989

The panel of judges that rendered the decision in this case having voted to deny a petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc,

It is ordered that the suggestion for a petition for rehearing en banc be denied.

By the Court:
FRANCIS P. SCIGLIANO
Clerk

EXCERPTS FROM COLLECTIVE BARGAINING AGREEMENT

ARTICLE XI

Grievance Procedures

A. For the purpose of this Agreement, the term "grievance" is defined as an allegation by the Union that there has been a breach or misapplication or misinterpretation of the expressed term(s) of this Agreement which are subject to the Grievance Procedure. . . .

. . .

STEP 3:

. . . If the grievance originates from an action outside a particular Department or Division, it must be presented in writing to the Dean of Faculty within ten (10) calendar days after the action to be grieved occurred. . . .

. . .

General Provisions

. . .

E. Time limits designated in this Article for processing grievances and for bringing a matter to arbitration may only be extended by mutual written consent.

. . .

M. In arriving at any settlement or decision under the provisions of this Article, neither the parties nor the arbitrator shall have the authority to alter this Agreement in whole or in part or to add to or delete any of its provisions or to render any award in conflict with its provisions. . . . The arbitrator may decide only whether the Employer violated this Agreement as alleged in the grievance and the appropriate remedy under this Agreement, if any.

. . .

ARTICLE XXVII

Pre-Existing Rights, Privileges Or Benefits

A. The parties acknowledge that during the negotiations which resulted in this Agreement, each had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter not removed by law from the area of collective bargaining, and that the understandings and agreements arrived at by the parties after the exercise of that right and opportunity are fully and exclusively set forth in the Agreement. . . . All rights and duties of both parties are specifically expressed in this Agreement and such expression is all inclusive. This Agreement constitutes the entire agreement between the parties and concludes collective bargaining for its terms [sic], subject only to a mutual agreement to amend or supplement this Agreement.